APPEAL NO. 010180

Following a contested case hearing (CCH) held on November 7, 2000, and January 9, 2001, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a repetitive trauma injury, or any other type of injury, on or about _____, and that the claimant has not sustained disability. The claimant appeals this decision, arguing that the hearing officer's decision not to consider the medical evidence of Dr. VB, the treating physician, because he was not disclosed as a witness, was error, and further, that the hearing officer's decision that the claimant did not sustain a repetitive trauma injury or disability is against the great weight and preponderance of the credible evidence and should be reversed. The respondent (self-insured) responds that the hearing officer was correct in both determinations and should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error, we affirm the decision and order of the hearing officer.

The only fact the parties were able to stipulate to was that venue was proper at the field office of the Texas Workers' Compensation Commission. Approximately five days prior to _____, the claimant was transferred to the harness line at the self-insured's plant. The claimant was to be trained to install the wiring into trucks. The claimant testified that the line was moving at the rate of 55 to 60 trucks per hour and he had been doing the job for about five days. The claimant testified that on _____, he "felt something in his back," and he is now asserting a lower back and neck injury. The claimant attempted to introduce medical evidence and testimony from Dr. VB, the claimant's treating doctor. The self-insured objected on the grounds that Dr. VB was not properly identified as a testifying witness and there had been no timely exchange of records. The hearing officer sustained the objection and excluded Dr. VB's testimony and records from the evidence to be considered.

The self-insured's representative testified that the line was moving at about 30 trucks per hour, and the claimant was not doing the job, he was just watching another employee as he was still in training. The self-insured introduced medical reports from Dr. H, who examined the claimant at the request of the benefit review officer (BRO), and Dr. S, who examined the claimant at the request of the self-insured. Neither believed that an injury occurred on _____. Dr. H did not believe that the claimant's work activities were the source of injury to the lower back, or to the cervical spine.

Appealed Issue 1 and Decision: The hearing officer did not err in his decision to exclude from consideration the medical evidence of Dr. VB on the grounds that he was not disclosed as a witness.

Rationale: Section 410.160 requires that:

Within the time prescribed by commission rule, the parties shall exchange:

(1) all medical reports and reports of expert witnesses who will be called to testify at the hearing;

(2) all medical records;

(3) any witness statements;

(4) the identity and location of any witness known to the parties to have knowledge of relevant facts; and

(5) all photographs . . . (V.A.C.S. Art. 8308-6.33(d).)[.]

Section 410.161 provides that a party who fails to timely disclose information known to the party at the time disclosure is required may not introduce the evidence at any subsequent proceeding without a showing of good cause. Additionally, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (c)(1) (Rule 142.13(c)(1)) requires the parties to exchange documentary evidence and the identity and location of witnesses within 15 days after the benefit review conference (BRC) and as they come available. Rule 142.13(d) requires interrogatories to be presented no later than 20 days before the hearing and the answers shall be exchanged no later than 5 days after they are received.

It is clear from the record that the claimant had not responded to the self-insured's interrogatories at the time the CCH commenced. It is also clear that neither the claimant nor Dr. VB notified the self-insured that Dr. VB would be testifying. Both the claimant and Dr. VB assumed the self-insured knew Dr. VB would testify because he was the treating doctor of record. While Dr. VB testified that he had sent to the self-insured, by regular mail, billings with records attached, the self-insured denied receiving them. Dr. VB was not at the BRC, and nobody informed the self-insured he would be testifying. In Texas Workers' Compensation Commission Appeal No. 960817, decided June 6, 1996, the claimant wrote the carrier stating that "witnesses include the claimant and those health care providers who have examined or treated [claimant] as identified in the previously exchanged documents and report of the [BRO]." The Appeals Panel decided that, "the hearing officer could consider that the medical records claimant introduced contained the names of a number of doctors who apparently examined or treated claimant and that such general reference to them as was contained in this March 9th letter did not comply with Section 410.160(4) and Rule 142.13(c)(1)(D)." Because the claimant failed to comply with Section 410.160 and Rule 142.13, the hearing officer was correct in granting the relief contained in Section 410.161.

Appealed Issue 2 and Decision: The hearing officer's decision that the claimant did not sustain a repetitive trauma injury or disability is not against the great weight and preponderance of the credible evidence.

Rationale: The only admissible evidence in support of a compensable repetitive trauma injury and resulting disability presented at the CCH was the claimant's testimony. The self-insured presented conflicting testimony as to what activity the claimant was engaged in at work during the five days in question, as well as medical records from Dr. H and Dr. S. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals-level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635

(Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge